

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL
RECEIVED

MAR - 1 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Revision of Part 22 and Part 90)
of the Commission's Rules to)
Facilitate Future Development)
of Paging Systems)

WT Docket No. 96-18

Implementation of Section 309(j))
of the Communications Act --)
Competitive Bidding)

PP Docket No. 93-253

To: The Commission

DOCKET FILE COPY ORIGINAL

COMMENTS OF PRIVATE CARRIER PAGING LICENSEES

By: John A. Prendergast
Richard D. Rubino
Their Attorneys

Blooston, Mordkofsky, Jackson
& Dickens
2120 L Street, N.W.
Washington, D.C. 20037
(202) 659-0830

Filed: March 1, 1996

No. of Copies rec'd
List ABCDE

49

TABLE OF CONTENTS

Summary	ii
I. Statement of Interest.	1
II. The Application Freeze for the Private Carrier Shared Channels Should be Lifted Immediately.	2
A. The Paging Industry is Highly Competitive.	2
B. The Application Freeze Disrupts Business Plans and Prevents Necessary Incremental Modifications	3
C. Unlike Other Services Where Freezes Have Been Imposed, Paging is a Mature Industry.	8
III. In the Alternative, The Commission Must Establish an Interim Licensing Standard for the Shared Channels.	10
IV. Any Applications Submitted to PCIA Prior to the Effective Date of the Freeze Should be Processed to Grant on a Co-Primary Basis.	13
V. The Application Filing Freeze Contravenes Policies Protecting Small Businesses.	15
VI. Conclusion.	18

Summary

The private carrier paging industry is a highly mature and robust industry, with a high level of competition. Accordingly, the Commission should rescind the application processing freeze as it applies to the shared VHF and UHF private carrier paging channels. Since the shared channels have no formalized service or interference contours, unlike the other paging services, it appears that licensees on these channels cannot take advantage of the Commission's interim modification protections. Thus, the freeze is harmful to private carriers because it has paralyzed the industry so that it can no longer respond effectively to changes in subscriber requirements for service. As a result, subscribers will experience disruptions in service or reductions in coverage, which may result from causes beyond the control of the carrier.

Should the Commission determine that the freeze will not be rescinded, it is requested that the Commission accept any new facilities application which had been submitted to PCIA, the certified frequency coordinator, as of February 8, 1996, and allow licensees to establish new transmitters on a co-primary basis, provided such transmitters are located within a 40-mile radius of any currently authorized transmitter or any proposed transmitter (for which an application had been filed with the Commission as of February 8, 1996). In this way, private carrier licensees will be able to meet market demands for service during the pendency of this proceeding.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
MAR - 1 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)	
)	
Revision of Part 22 and Part 90)	WT Docket No. 96-18
of the Commission's Rules to)	
Facilitate Future Development)	
of Paging Systems)	
)	
Implementation of Section 309(j))	PP Docket No. 93-253
of the Communications Act --)	
Competitive Bidding)	

To: The Commission

COMMENTS OF PRIVATE CARRIER PAGING LICENSEES

Blooston, Mordkofsky, Jackson & Dickens, on behalf of its private carrier paging clients listed in Attachment A hereto (the Paging Licensees), and pursuant to Section 1.415(a) of the Commission's Rules, hereby submits their comments in the above-captioned proceeding.

I. Statement of Interest.

The Paging Licensees are all carriers operating on private carrier paging shared channels, many of them in rural areas. All of the Paging Licensees will be adversely affected by the Commission's application freeze, especially as applied to the private carrier shared channels on which they operate. Most of the Paging Licensees are offering a substantial service to the public, but are still in the process of building out their systems in order to meet the present and future needs of their customers. The imposition of a freeze on paging applications in the shared frequency bands eliminates their flexibility in responding to the

marketplace which would ultimately hinder their ability to effectively compete.

II. The Application Freeze for the Private Carrier Shared Channels Should be Lifted Immediately.

The Paging Licensees have reviewed the Commission's captioned Notice of Proposed Rule Making (NPRM), including the Commission's recognition that the paging industry is mature, competition is robust, and spectrum is scarce. Id. at Paras. 5 - 6, 17. In light of these factors, the Paging Licensees cannot understand why the Commission would propose market area licensing for the shared private carrier VHF and UHF channels, and impose a freeze on the acceptance of future applications, pending the outcome of its rule making. The Commission's premise that the shared channels can be converted to exclusive use, is misplaced given the co-channel environment in most large and medium size markets, and even some of the smaller markets. Therefore, the Paging Licensees urge the Commission to (1) abandon its proposal to auction what is currently shared spectrum and (2) rescind the application freeze on these channels immediately. Such action would be in the public interest.

A. The Paging Industry is Highly Competitive.

Private carrier paging operators provide the public with a significant alternative to common carrier paging services. Because of lower costs associated with private carrier paging operations, carriers have been able to attract new subscribers, who might otherwise forgo paging

services. In the captioned NPRM, the Commission points out that paging industry grew by approximately 29 percent in calendar year 1993, and 38 percent in calendar year 1994, bringing the total subscribership in the United States to more than 27 million. NPRM at Para. 6. Analysts predict that by the year 2000, 15 percent of the population (or 41.5 million people) will carry pagers. Id. By proposing market area licensing and freezing the acceptance of applications for new facilities during the pendency of this proceeding, the Commission has now hamstrung existing carriers and jeopardized the growth of this very mature and vibrant industry. In many cases, carriers will be left to "wither on the vine" because they cannot adequately respond to customer demands for improved service.

B. The Application Freeze Disrupts Business Plans and Prevents Necessary Incremental Modifications.

In adopting the captioned NPRM, and in an attempt to allay the fears of the paging industry, Chairman Hundt stated at the February 8, 1996 Commission Open Meeting that the Commission had heard the industry's fears of an application freeze, and had taken appropriate action to ensure that existing carriers would be able to make necessary modifications to their paging systems. Commissioner Quello stated that he opposed application freezes and that therefore, he could support the market area licensing item. These sentiments, taken together with the published separate statements of Commissioners Ness and

Chong¹, gave the industry the impression that the Commission was cognizant of the harmful impact of an application freeze. Further, the tenor of the meeting even suggested that a freeze for new applications would not be imposed, pending the outcome of the captioned market area licensing proposal.

However, upon reviewing the Commission's February 8, 1996 News Release and the captioned NPRM itself, the Paging Licensees learned that an application freeze had been imposed, and that it is far more comprehensive for shared paging licensees than for any other segment of the industry. While the Commission permits system modifications, provided that such modifications stay within the system's composite interference contour, no such contour exists for the private carrier paging facilities licensed on the shared VHF and UHF channels. In the absence of an immediate issuance of protection standards for shared operations, the Commission's interim licensing procedures will place these private carrier licensees at a significant competitive disadvantage,

¹ Commission Ness stated that the Commission would "tak[e] measures [to] allow existing paging businesses to continue to meet customer demand during the pendency of this proceeding without undermining [the Commission's] objectives." See Separate Statement of Commissioner Susan Ness at 1. Commissioner Chong noted that "[i]n crafting our decision to manage a smooth transition, I have been very mindful that we do not inadvertently hinder the ability of paging carriers to either compete or continue to expand their businesses. To this end, we have attempted to take actions that will not impede competition, growth, and innovation in the paging market during the transition." See Separate Statement of Commissioner Rochelle Chong at 2.

since they will be unable to modify their systems in order to meet customer demands for service.² Other paging licensees will have some degree of flexibility in modifying their systems.

The Paging Licensees submit that the freeze on the acceptance of private carrier paging applications for the shared-use frequency bands has all but halted the implementation of the industry's business plans -- plans which have been made in due course over a period of many months to years. Carriers are now being forced to shelve, indefinitely, their planned expansion, as well as modifications which are needed to ensure reliable coverage and building penetration until the Commission resolves whether shared private carrier frequencies are suitable for conversion to exclusive licensing, and hence, auction.³

² Unlike the other paging services, paging carriers licensed on the shared VHF and UHF frequencies must obtain FCC approval for all modifications to existing paging systems. This requirement, which encompasses prior frequency coordination, is necessary to take into account, not only co-channel stations, but also adjacent channel stations which may be licensed in other radio services, e.g., Special Industrial Radio Service, the Petroleum Radio Service, etc. Thus, under the freeze, shared licensees have no leeway whatsoever to modify their systems.

³ Some of the Paging Licensees have recently been approached by hospitals and other medical facilities for paging service. Currently, applications to bring this necessary service to these subscribers are pending at the Commission. Additionally, some of the Paging Licensees have applications which were submitted to PCIA prior to the Commission's freeze, but which were not processed in time to permit the applications to be forwarded to the Commission prior to February 8, 1996. Further, as subscribers

(continued...)

Most of the Paging Licensees have had ongoing plans to build out their private carrier paging operations incrementally, as justified by reasoned and prudent business planning, and have invested significant resources, much of which will be lost if the freeze is not immediately lifted. These expenses include planning and design costs, site acquisition, site leases, engineering and legal costs associated with the preparation and filing of the applications, frequency coordination fees, etc., not to mention the "human" costs if employees must be laid off because the carrier is unable to retain subscribers due to the inflexibility of the paging freeze. Because of the adverse impact that the paging freeze will have on private carrier paging industry, the Paging Licensees urge the Commission to immediately rescind the paging freeze, as it is applicable to VHF and UHF private carrier paging operations.

The Paging Licensees note that, as recently as 1993, the Commission concluded in its Report and Order, in PR

³(...continued)

established new offices, plants, etc., the Paging Licensees will not be able to modify their systems to provide continued service, so long as the application freeze is in place. Thus, subscribers may be forced to do without service at their new facility, either because the subscribers are now located too far from the existing transmitter, or if located within a reasonable distance of the transmitter, because of propagation variables, the building penetration is insufficient to meet the subscriber's needs (e.g., unable to broadcast a reliable signal into a building's basement or interior core).

Docket No. 93-35, that the shared VHF and UHF private carrier channels were not suitable for conversion to exclusive licensing. In that these channels have become even more congested since the Commission declined to license these channels on an exclusive basis, the Paging Licensees respectfully submit that these frequencies are now even less suitable for conversion to licensing on an exclusive basis. Therefore, shared PCP licensees were not on notice that the market area paging proposal would apply to shared channels, and could not have planned accordingly. Moreover, the heavily-licensed status of the shared channels, and the Commission's previous conclusion that shared channels are not suitable for exclusive licensing, indicate that these channels should ultimately not be auctioned. This is further justification to lift the freeze, for shared licenses will only suffer doubly if they are forbidden to modify their systems during the rulemaking, and then have the Commission conclude that the freeze was unnecessary after all.

In this regard, the NPRM does not recognize the fact that operators of internal paging systems (e.g., hospitals, manufacturing facilities, etc.) are also licensed on these shared channels. These entities use the shared frequencies in order to ensure a "secure" means of communications, over which they have some measures of control for priority pages. The presence of these systems on the shared channels only

further complicates the implementation of auctions, and demonstrates that a freeze is unnecessary. Market area licensing on these channels is impracticable. If the freeze is not lifted during the pendency of this proceeding, operators of internal paging systems will not be able to modify their systems in order to meet their specialized communications needs. Since many of these systems are operated by hospitals, this aspect of the freeze contravenes the mandate of Section 1 of the Communications Act to further the use of radio for safety purposes.

C. Unlike Other Services Where Freezes Have Been Imposed, Paging is a Mature Industry.

The Commission indicates that the imposition of a paging freeze, during the pendency of this rule making, is consistent with actions that the Commission has taken in other rule making proceedings where it has sought to implement market area licensing. See NPRM at Para. 139. As discussed below, while the Commission seeks to grant relief to existing carriers, by allowing them to make certain modifications during the freeze, the Paging Licensees submit that the paging industry is significantly different from the 38 GHz, and even the 800 MHz SMR⁴ services, where the Commission has imposed application freezes in contemplation of market area licensing. Unlike the 800 MHz SMR and 38 GHz

⁴ In the 800 MHz SMR services, the Commission proposed to relocate existing facilities to new spectrum. Such is not the case with the paging services.

services, the paging service is a very mature and competitive industry, as evidenced by recent developments in price reductions and increases in market penetration. Further, unlike the 800 MHz SMR proceeding, the Commission is not proposing to implement a new paging technology or relocate existing licensees to new spectrum, in order to make way for market area licensing. In the 38 GHz band, there has been much application activity, and more recently several licenses have been issued. However, the industry is not mature, in terms of having established operators that will be as significantly harmed by a freeze. Indeed, the 38 GHz proceeding will make available a large block of unlicensed spectrum for auction, in addition to the current allocation. Thus, the 38 GHz applicants will, on the whole, benefit from the pause needed to implement auctions. For shared paging licenses, the "cure" of a freeze will prove more fatal than the perceived "disease" of less flexible licensing.

Thus, because the paging service can be easily distinguished from other services where a freeze has been imposed in contemplation of market area licensing, and because of the devastating effect that a freeze will have on the industry, the Commission should immediately lift the application freeze, with respect to the shared private carrier paging channels.

III. In the Alternative, The Commission Must Establish an Interim Licensing Standard for the Shared Channels

In the event that the Commission does not lift its freeze on shared paging applications, the Paging Licensees urge the Commission to establish a mechanism whereby carriers can implement modifications to existing systems in order to replace lost sites or meet subscriber demands for service, commensurate with the rights being accorded to the other bands.⁵

As discussed above, Part 90 of the Commission's Rules, unlike Part 22, does not superimpose measured service and interference contours on paging facilities operating on the shared VHF and UHF frequencies. Accordingly, the Paging Licensees urge the Commission to allow shared channel licensees to establish additional or relocated transmitters within 40 miles of a transmitter site authorized to them as of the adoption date of the captioned NPRM, or which could have been placed into operation by them, pursuant to conditional temporary authority as of the adoption date of the captioned NPRM. See Rule Section 90.159.

⁵ In footnote 271 of the NPRM, the Commission adopted a 21 dBuV/m interference contour standard. Para. 140 of the NPRM could be interpreted as applying the 21 dBuV/m interference standard to all paging bands for purposes of allowing modifications and fill-in transmitters. However, because footnote 271 refers back to Para. 52 of the NPRM, there is a strong suggestion that the adoption of this revised contour applies only to the 900 MHz paging bands. If the Commission intended that this footnote create a new protection standard for the shared channels, it should do so more explicitly.

In this way, the Commission would be able to meet its goals of ensuring that carriers have sufficient flexibility to provide the necessary coverage to their subscribers while preserving the opportunity to determine if market area licensing is appropriate in the shared VHF and UHF private carrier paging bands. Because of the large financial investment typically required for station construction, and in order to encourage lender financing, as may be necessary, the Paging Licensees urge the Commission to grant co-primary status to any such modifications made during the interim licensing period. Permitting facilities established during this interim licensing period to operate on an secondary, rather than on a co-primary basis would be counter-productive, in that the Paging Licensees foresee investor and lender resistance to substantial investment in equipment where the stations could later be forced off the air by a market-area licensee. More importantly, it is not reasonable to subject the customers of these established systems to a disruption of service, if the auction winner forces such secondary transmitters to cease operation.

The Commission's current rules require frequency coordination of proposals on the shared VHF and UHF PCP channels. While the Commission has indicated that licensees may make modifications to their existing systems without prior Commission approval, provided such modifications are wholly contained within the system's composite interference

contour, the Paging Licensees urge the Commission nonetheless to require prior frequency coordination in accordance with Rule Section 90.175 in order to prevent harmful interference to co-channel and adjacent channel operations. Further, the Paging Licensees suggest that licensees be given the option of notifying the Commission, on FCC Form 600, of the implementation of any such transmitters, with evidence of prior frequency coordination. Such stations would receive co-primary status with regard to any stations ultimately licensed as a result of the Commission's disposal of the captioned NPRM.

In this way, shared channel carriers would be able to relocate facilities, overcome propagation problems and expand their systems incrementally, in order to meet the ever changing demands for service from their subscribers, during the pendency of this proceeding. The instant rulemaking is likely to take several months to resolve, and any resulting auctions probably would not occur for more than a year. While the 40 mile expansion right suggested above may have some impact on the availability of "white space" for auction purposes, such impact will be minimal. In large and even medium markets, expansions by one licensee are likely to be in areas already licensed to a shared co-channel user, rendering the area unavailable for auction. In smaller markets, such expansions will likely be into remote areas of little interest to potential bidders. This

incidental reduction of auctionable area is a small price to pay in order to preserve the viability of existing licensees, especially when they were not given adequate warning that the auction proposal and freeze would apply to them.

IV. Any Applications Submitted to PCIA Prior to the Effective Date of the Freeze Should be Processed to Grant on a Co-Primary Basis.

The Paging Licensees urge the Commission, for purposes of the paging application freeze, to treat any application submitted to the frequency coordinator on or before February 8, 1996, as filed with the Commission. Rule Section 90.175 requires applicants for spectrum in the shared private carrier paging bands to first obtain a frequency recommendation from the frequency coordinator certified by the Commission (in this case, PCIA). As a result, the applicant has no power over when a particular application is filed with the Commission.⁶ The Paging Licensees, like many other carriers for shared private carrier frequencies, have

⁶ Rule Section 90.175 provides, in pertinent part, as follows:

[E]ach application for a new frequency assignment, for change in existing facilities, . . . must include a showing of frequency coordination, as set forth below. . . . When frequencies are shared by more than one service, concurrence must be obtained from the other applicable certified coordinators.

(a) For frequencies between 25 and 470 MHz. A statement from the applicable frequency coordinator recommending the most appropriate frequency.

submitted applications in good faith to PCIA, the appointed coordinator for the private carrier paging frequencies. See NPRM at Para. 15. Unfortunately, PCIA was not able to get all of the shared channel applications processed in time to be filed with the Commission, prior to the imposition of the application filing freeze.

The Commission certified frequency coordinators essentially act as "agents" of the Commission, fulfilling many of the responsibilities concerning frequency and compliance review, which were formerly handled directly by the Commission's application processing staff. While the Commission is not bound by its frequency coordinators' recommendations, it is nonetheless extremely rare that a frequency recommendation of the coordinator is rejected. It is not unusual for coordination to take several months, particularly for those applications which require interservice coordination.⁷ In that most of the delay in the frequency coordination process is due to reasons beyond the control of the applicants (i.e., speed of service), and since frequency coordination is a condition precedent to the filing of an application with the Commission, it is respectfully submitted that the Commission should treat all

⁷ For example, Lubbock Radio Paging Service, Inc. submitted its application to PCIA on December 12, 1995, for authority to establish five additional transmitters on the frequency 152.48 MHz. Because the application required interservice coordination, PCIA was not able to file the application prior to the Commission's application freeze.

applications received by PCIA as of February 8, 1996, as being filed with the Commission for purposes of the application freeze. Such action would be in the public interest in order to ensure that paging carriers will be able to make necessary modifications to their systems (on a co-primary basis), which were already planned and needed, and now forestalled, perhaps indefinitely, by the application freeze.

V. The Application Filing Freeze Contravenes Policies Protecting Small Businesses.

Congress and the Commission have long recognized that small businesses make up an important element of the U.S. economy.⁸ Congress has passed legislation designed to protect small businesses, because of their contributions to universal service and their role in the economy. By imposing an undue burden on small carriers, the Paging

⁸ Little more than a decade ago, small businesses produced 43% of the Gross National Product and provided 55% of the nation's jobs. "[B]etween 1969 and 1976, small business created almost two thirds of all new jobs in the national economy." Regulatory Reform: Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, Part 3, 96th Cong., 1st Sess. 343, 344-45 (1979). (Small Business: A Critical Element of the American Economy, Remarks of Alfred Dougherty, Jr., Director, Bureau of Competition, Federal Trade Commission) [hereinafter "Dougherty Remarks"]. In the communications industry, small businesses are the largest provider of rural telecommunications (including mobile services such as paging), especially in those places where larger carriers find that the population and the terrain do not justify their investment. This is evidenced by the recent sale of a number of telephone exchanges by U S WEST Communications, Inc. to various small telephone companies, including subscriber-owned cooperatives.

Licensees believe that the application freeze on shared private carrier paging channels will frustrate the Congressional goals underlying this legislation.

Congress also passed the Regulatory Flexibility Act, Pub. L. No. 96-354, 194 Stat. 1164 (1980), for the reason that "unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes." §2(a)(5). In passing this legislation, Congress found that the harmful effect of unnecessarily burdensome Federal Regulations on small businesses does not serve the public interest. Because the application freeze would disproportionately impact small businesses by causing them to curtail or discontinue radio services to the public, through no fault of their own, the Paging Licensees submit that the Commission's proposed application freeze would contravene the legislative policy underlying the Regulatory Flexibility Act by decreasing competition in the market place.

"The public interest lies directly in two areas: (1) the disproportionate impact of governmental regulation on small businesses reduces the competitive capacity of small business, thereby placing Government in the strange position of encouraging economic concentration, and (2) consumers, to a large extent, must pay the cost of regulation in the form of higher prices. Thus, while the most immediate and visible impact may fall to the small [business], the public

shares the burden" in the form of higher prices." 126 Cong. Rec. 24,575, 24,588. The market area licensing proposal, if adopted, would encourage consolidation of the industry, by taking the shared paging channels (one of the last vestiges for small carriers) and squeezing them into the mold of large, exclusive MTA licenses. The freeze furthers this process by impairing the ability of existing, smaller licensees to respond to the market place for an indefinite period of time. Moreover, the extremely low entry barrier for new entrants represented by the shared frequencies will be replaced by an expensive auction process for large license areas.

The market area licensing proposal, if adopted, would encourage consolidation of the industry, by taking the shared paging channels (one of the last bastions for small carriers) and squeezing them into the mold of large, exclusive MTA licenses. The freeze furthers this process by impairing the ability of existing, smaller licensees to respond to the marketplace for an indefinite period time. Moreover, the extremely low entry barrier for new entrants represented by the shared frequencies will be replaced by an expensive auction process for large license areas.

Thus, as the Commission recognizes that there is little unlicensed spectrum left, the overriding public interest in allowing the smaller carriers to improve their existing

service to the public outweighs any benefit that the Commission might gain from the application freeze.

V. Conclusion.

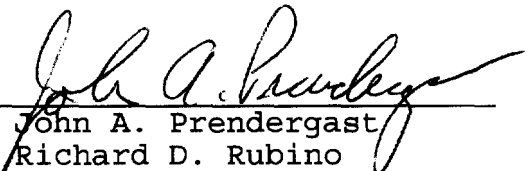
The Paging Licensees implore the Commission to rescind the application processing freeze as it applies to the shared private carrier paging bands. In that these frequency bands are heavily licensed and congested with traffic, and subject to complex non-interference arrangements by multiple licensees (including internal use operators) conversion of these frequencies to market area licensing would be ill advised. Further, the imposition of the freeze by the Commission has paralyzed the shared channel paging industry so that it can no longer respond effectively to subscriber and market demands. As a result, subscribers will experience reduced coverage, especially where a licensee is not able to replace a lost site, or install an additional transmitter in order to meet subscribers' coverage requirements.

In the event that the Commission determines that it will not lift the freeze, the Paging Licensees request that the Commission accept any facilities application which was submitted to PCIA, on or before February 8, 1996; allow licensees to establish additional transmitters, on a co-

primary basis, within a 40-mile radius of any currently authorized or proposed co-channel transmitter.

Respectfully submitted,

By


John A. Prendergast
Richard D. Rubino
Attorneys for The Private
Carrier Paging Licensees

Blooston, Mordkofsky, Jackson
& Dickens
2120 L Street, N.W.
Washington, D.C. 20037
Tel: (202) 659-0830

Filed: March 1, 1996

Attachment A

Page Hawaii

Lubbock Radio Paging Service, Inc.

WT Services, Inc. d/b/a Panhandle Paging

Mobile Phone of Texas, Inc.